

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

In the Matter of the Revocation of the Child  
Care License of Judy Luppino

**FINDINGS OF FACT,  
CONCLUSIONS, AND  
RECOMMENDATION**

This matter came on for hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) on May 14, 2012 at the Anoka County Government Center, Anoka, Minnesota, pursuant to a Scheduling Order, filed April 4, 2012.

Francine P. Mocchi, Assistant County Attorney, appeared on behalf of Anoka County Human Services (County) and the Minnesota Department of Human Services (Department).

Steven R. Coon appeared on behalf of Ms. Luppino (Respondent). The OAH hearing record remained open until June 8, 2012, for receipt of Exhibit E (Grace Counseling Services Chemical Evaluation) and written arguments.

**STATEMENT OF ISSUE**

1. Did the Department establish reasonable cause to revoke Judy Luppino's child care license for failing to comply with Minnesota law?

The Administrative Law Judge finds that Respondent failed to meet her burden of proof by a preponderance of evidence that she complied with Minnesota law. The Department's revocation of Respondent's child care license was proper, based on her refusal to cooperate with an investigation by failing to sign release of information forms and by her refusal to enroll in an outpatient chemical dependency treatment program as recommended.

Based on all of the files, records and proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Respondent has been providing licensed daycare services for thirty-three years. At the time of the hearing, Respondent had two full-time children, and had one part-time child. The part-time child attended the program before and after school. Before the present matter, Respondent has never had an adverse licensing action taken against her day care program.<sup>1</sup>

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<sup>1</sup> Testimony of Respondent (Rspdt. Test.), Mathias Test., Licensing Investigator.

2. In January 2011, Respondent underwent surgery at Mercy Hospital in Coon Rapids for an aneurysm and blood clot in her intestine. Hospital staff was aware that Respondent operated an in-home child care program. Hospital staff perceived what appeared to be Respondent going through alcohol withdrawal symptoms. A nurse became concerned because Respondent had admitted at a pre-admission interview that she consumed a case of beer per week. On three occasions during her stay, hospital staff offered Respondent opportunities to meet with a chemical use counselor, but Respondent declined.<sup>2</sup>

3. Prior to discharge, a hospital social worker reported to the Anoka County Child Protection Office that she believed that Respondent was experiencing “d.t.s from alcohol withdrawal.”<sup>3</sup> Child Protection referred the matter to the Anoka County Complaint Investigations/Child Care Licensing Unit.<sup>4</sup>

4. Based on the complaint, the Licensing Investigator (Licensor) commenced an investigation. On March 2, 2011, licensing staff made an unannounced visit to Respondent’s home where she operates her child care program. Respondent had just re-started providing child care services following her surgery. They informed Respondent that they were there regarding a concern about her chemical use.<sup>5</sup>

5. At that visit, Respondent discussed her alcohol use with the Licensor. Respondent said that she drinks beer on weekends and on Wednesday evenings while watching “Survivor;” the television reality show. She denied drinking daily and that she has a problem.<sup>6</sup>

6. Respondent estimated that she drinks three beers during the one hour Survivor show and that she has six beers on the weekends. She denied drinking during day care hours. During occasional parties, Respondent drinks to intoxication. It takes her six or more beers to get intoxicated. During the visit, Licensor saw an empty beer case. The beer was in the refrigerator crisper covered by a towel.<sup>7</sup>

7. Respondent acknowledged that she had a problem with alcohol in February 1991 because her parents had died and she was drinking heavily. Her daughter was concerned about her mother’s alcohol use at the time and mentioned this to a teacher at school. The school reported this to child care licensing, who requested a chemical evaluation. Respondent submitted to a chemical dependency evaluation, but treatment was not required. It was recommended that Respondent attend weekly ACD (alcohol chemical dependency) meetings.<sup>8</sup>

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<sup>2</sup> Mathias Test., Ex. 2.

<sup>3</sup> Delirium tremens is defined as “a violent delirium with tremors induced by excessive and prolonged use of alcoholic liquors.” Merriam-Webster Online Medical Dictionary, <http://www.merriam-webster.com/medical/tremens?show=1&t=1337029759>.

<sup>4</sup> Mathias Test., Ex. 2.

<sup>5</sup> Ex. 2.

<sup>6</sup> Mathias Test.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, Rspdt. Test.

8. Written surveys were sent to two current child care parents. Both parents replied to the survey and gave Respondent high marks for her the provision of child care.<sup>9</sup>

9. Based on the investigation, child care licensing recommended that Respondent submit to a chemical dependency evaluation.<sup>10</sup>

10. On April 28, 2012, Aleesha R. Oletzke, BS/LADC (Chemical Evaluator), conducted and issued a chemical dependency assessment based on her discussion with Respondent. She found that Respondent meets the DSM IV criteria for a diagnosis of 305.01 – Alcohol Abuse Continuous. She recommended that Respondent take a level one substance abuse education course, remain abstinent from mood altering substances, attend weekly AA meetings, obtain a sponsor, and comply with child care licensing requirements.<sup>11</sup>

11. The Chemical Evaluator called the Licenser for collateral information on April 28, 2011 but the Licenser did not return her call until after the Chemical Evaluator had issued her assessment.<sup>12</sup>

12. The Licenser contacted the Chemical Evaluator and discussed the events that led to the chemical dependency assessment recommendation, including the following: that the staff at the hospital said that Respondent admitted to drinking a case of beer a week, that she drank beer on Wednesdays and weekends, that she drank as many as 3-6 beers on each occasion, and occasionally, drank to intoxication. Respondent reported that her husband had concerns about her drinking and wished she would not drink during the week and only drink with him on weekends. Respondent denied drinking during child care hours and did not feel she had a drinking problem.<sup>13</sup>

13. At the end of that conversation, the Chemical Evaluator told Licenser to disregard the emailed assessment she had sent to Licenser because that was not the information Respondent had given her. The Chemical Evaluator told Licenser that she would be updating the assessment based on the information related to her by the Licenser.<sup>14</sup>

14. On May 4, 2011, the Chemical Evaluator issued her revised assessment based on the collateral information provided by Licenser. Her revised assessment recommended that Respondent enter and complete an outpatient treatment program and follow the recommendations made for her. Although Respondent was not diagnosed as alcohol dependent, it is appropriate to recommend outpatient treatment to a person with a diagnosis of continuous alcohol abuse.<sup>15</sup> The Chemical Evaluator noted

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<sup>9</sup> Exs. C and D.

<sup>10</sup> Mathias Test.

<sup>11</sup> Oletzke Test., Exs. 6 and A.

<sup>12</sup> Mathias Test.

<sup>13</sup> *Id.* and Ex. B.

<sup>14</sup> *Id.* and Oletzke Test.

<sup>15</sup> Oletzke Test., Exs. 5 and B.

that Respondent was being treated for and was prescribed medication for high blood pressure and depression. It is inappropriate for Respondent to consume alcohol while taking these medications.<sup>16</sup>

15. On May 24, 2011, the Licensors wrote Respondent a letter inquiring whether she had begun the recommended outpatient treatment program. Licensors also enclosed two release of information forms to be signed by Respondent so the Licensors could speak to her husband and another close relative, preferably, her daughter, about Respondent's confidential information. Finally, the letter indicated that Respondent follow the recommendations of the assessment or her failure to cooperate could result in a negative licensing action against her child care program.<sup>17</sup>

16. On June 3, 2011, Licensors received the unsigned release of information forms. Respondent declined to execute them, stating that her husband and daughter were not interested in participating in the investigation.<sup>18</sup>

17. On June 9, 2011, Licensors issued Respondent a Correction Order, citing violation of Minn. R. 9502.0335, subd. 6A.<sup>19</sup> The Correction Order gave Respondent until June 20, 2011, to come into compliance by enrolling in the recommended chemical dependency outpatient treatment program. Respondent failed to enroll in the treatment program by June 20, 2011, or return the signed Correction Order by July 9, 2011, as requested.<sup>20</sup>

18. Based on Respondent's refusal to comply with the treatment recommendation, the Licensors felt she had no alternative but to recommend license revocation. This is not what she wanted or expected. Licensors thought that Respondent would have complied, no adverse licensing action would have been necessary, and Respondent would have continued to provide child care.<sup>21</sup>

19. At the hearing, Respondent took exception to the hospital staff's diagnosis that she was going through alcohol withdrawal post-surgery. She explained that she had some difficulty coming off of the anesthesia and was "combative" post-surgery with the nurses because they did not permit her to go to the bathroom when she needed to.<sup>22</sup>

20. Respondent did not deny that she told a nurse that she drank a case of beer a week but explained that medical personnel had told her to drink more than she normally did for health and safety reasons.<sup>23</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> Ex. 4.

<sup>18</sup> *Id.* at 100012.

<sup>19</sup> See Conclusion 5. Citations to Minnesota Rules refer to the 2011 Edition.

<sup>20</sup> Ex. 3.

<sup>21</sup> Mathias Test., Ex. 1.

<sup>22</sup> Rspdt. Test.

<sup>23</sup> *Id.*

21. Respondent denied that she was offered any opportunities to meet with a chemical dependency counselor at the hospital.<sup>24</sup>

22. Respondent did not deny that her husband had concerns about her drinking during the week. She explained that his concern was mainly financial.<sup>25</sup>

23. Respondent objected to taking a 12 month outpatient treatment program but during the course of the hearing the Chemical Evaluator testified that the program consisted of 23 – 2 hour sessions which could be completed in just over a month with weekly AA meetings thereafter.<sup>26</sup>

24. Over the objection of the County, the ALJ allowed the record to remain open pending the receipt of a third chemical dependency evaluation which was commenced on May 10, 2012, but was not available at the time of hearing.

25. The Grace Counseling evaluation was received on May 23, 2012. This Chemical Evaluator used Respondent's husband and her County daycare case manager as collateral contacts. The Report makes no reference to any of the facts that led to the initial chemical evaluation, nor was the Licensor who conducted the investigation contacted as a collateral source.<sup>27</sup>

26. Instead, this Evaluator wrote, "Judy is a 58 year-old female who came to Grace Counseling for a Chemical Assessment due to the request of her attorney for a second opinion." There is no reference in the Report under "Collateral Information" that the first opinions were considered.<sup>28</sup>

27. While Grace Counseling found that Respondent abuses alcohol, the Report reads, "There is no recommendation at this time."<sup>29</sup>

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner authority to conduct this contested case proceeding and to make findings of fact, conclusions of law, and recommendations.<sup>30</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*, Oletzke Test.

<sup>27</sup> Ex. E.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Minn. Stat. §§ 14.50, 14.69, and 245A.07, subd. 3. Citations to Minnesota Statutes refer to the 2011 Edition.

2. The Department gave proper and timely notice of the hearing in this matter and has fulfilled all procedural requirements.

3. Minnesota law does not permit a chemically dependent person to provide child care services, absent participation in recommended treatment.<sup>31</sup>

4. The Department relied on the following laws as a basis for its revocation:

Minnesota Statutes, section 245A.07 SANCTIONS.

Subdivision 1. (a) In addition to making a license conditional under section 245A.06, the commissioner may suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

Subd. 6. **Commissioner's evaluation.** Before issuing, denying, suspending, revoking, or making conditional a license, the commissioner shall evaluate information gathered under this section. The commissioner's evaluation shall consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder.

5. The Department relied on the following rules as a basis for its revocation:

Minnesota Rule, part 9502.0335 LICENSING OF FACILITIES FOR CHILDREN FAMILY DAY CARE AND GROUP FAMILY DAY CARE HOMES.

Subpart 1. **Purpose.** The purpose of parts 9502.0315 to 9502.0445 is to establish procedures and standards for licensing family day care and group family day care homes to ensure that minimum levels of care and service are given and the protection, proper care, health, safety, and development of the children are assured.

Subp. 2. **Licensing study.** The applicant shall give the agency access to the residence for a licensing study to determine compliance with parts 9502.0315 to 9502.0445.

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<sup>31</sup> Mathias Test., Minn. R. 9502.0335, subd. 6.

D. The commissioner or agency may require, prior to licensure, or anytime during the licensed term of day care, a physical, mental illness, or chemical dependency or abuse evaluation of any caregiver or person living in the residence or present during the hours children are in care if the agency has reasonable cause to believe that any of the disqualification factors in subpart 6, item A, exist, or that the provider is not physically able to care for the children. These evaluations, conducted by a licensed physician, psychiatrist, psychologist, consulting psychologist, or certified chemical dependency practitioner or counselor may be used to verify physical or mental illness, chemical dependency or chemical abuse, or behavior that would reflect on the ability of the provider to give day care.

Subp. 6. **Disqualification factors.** An applicant or provider shall not be issued a license or the license shall be revoked, not renewed, or suspended if the applicant, provider, or any other person living in the day care residence or present during the hours children are in care, or working with children:

A. Abuses ... alcohol, to the extent that the use or abuse has or may have a negative effect on the ability of the provider to give care.... Caregivers who ... have been dependent on ... alcohol, such that the use, abuse, or dependency ... required treatment or therapy, must have 12 months of verified abstinence before licensure.

6. The Department has established reasonable cause that Respondent has been diagnosed with continuous alcohol abuse for which treatment has been required and Respondent has declined that treatment. Respondent has not carried her burden by a preponderance of evidence that she complied with Minnesota law.

7. The Department also relied on Minn. Stat. § 245C.09 as a basis for its revocation:

Subdivision 1. **Disqualification; licensing action.** An applicant's, license holder's, or other entity's failure or refusal to cooperate with the commissioner, including failure to provide additional information required under section 245C.05, is reasonable cause to disqualify a subject, deny a license application, or immediately suspend or revoke a license or registration.

8. The Department has established reasonable cause that Respondent failed to cooperate by not signing the release of information forms that were intended for her husband and daughter. Respondent has not carried her burden by a preponderance of evidence that she complied with Minnesota law.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the Commissioner AFFIRM the February 6, 2012 Order of Revocation or impose any other sanction as deemed appropriate by the Commissioner.

Dated: July 3, 2012

/s/ Manuel J. Cervantes  
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MANUEL J. CERVANTES  
Administrative Law Judge

Reported: Digital Recorded  
No transcript prepared

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Human Services will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Lucinda Jesson, Commissioner, Department of Human Services, and P.O. Box 64998, St. Paul, MN 55164-0998, 651-296-2701 to learn the procedure for filing exceptions or presenting argument.

Pursuant to Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve her final decision upon each party and the Administrative Law Judge by first class mail.

### **MEMORANDUM**

This matter commenced with a January 2011 complaint by hospital staff when they observed what they believed to be withdrawal symptoms exhibited by Respondent post-surgery. When they spoke to Respondent, she admitted that she drank a case of beer per week. At the hearing, Respondent attempted to explain this away by saying that a health care provider had told her to do this for her own safety. Based on their perception and Respondent's admitted alcohol use, the staff offered Respondent the opportunity on three separate occasions to meet with a hospital chemical dependency counselor. Respondent denied that these offers were ever made. Respondent's above explanations appear implausible.



Respondent also failed to cooperate with the investigation by not signing the release of information forms intended for her husband and her daughter. The fact that she indicated at the hearing that they were not willing to participate in the investigation is not a defense to this violation. Respondent could have and should have signed the releases or risk the possibility of a sanction. If she had signed the releases and her husband and daughter then choose not to participate, she would have fulfilled her obligation to cooperate.

Just prior to the commencement of the hearing, Respondent sought a second chemical assessment. Her husband and daughter apparently had a change of heart and participated in this evaluation. The ALJ has given little weight to the Grace Counseling evaluation because it does not appear that this chemical dependency evaluator had all the relevant facts. The Grace Counseling recommendation is not dissimilar to the initial report issued by Ms. Oletzke, without the benefit of the collateral information surrounding Respondent's hospital stay and subsequent information.

To Respondent's credit, she has never had a negative licensing action in the thirty-three years of operating her child care program. At the hearing, a parent and grandparent of program participants spoke highly of Respondent's child care skills. One witness was a retired police officer. He testified that he was trained in discerning whether a person was under the influence of drugs or alcohol. He also testified that he had regular contact with Respondent when picking up his granddaughter. He said he never noted any hint of alcohol use by Respondent.

Under Minnesota licensing rules, if chemical dependency or abuse is diagnosed by a health care professional and therapy is recommended, failure to undergo the recommended treatment is a basis for a negative licensing action.

It became apparent at the hearing that there was a misunderstanding as to the length of the outpatient program. Respondent believed mistakenly that it was a year-long program. The Commissioner has discretion to make the license conditional, if Respondent were to agree to undergo and complete the recommended outpatient treatment and follow the ongoing recommendations.

In conclusion, the record, taken as a whole, supports the Department's negative licensing action. The ALJ recommends that the Commissioner impose a sanction as deemed appropriate by these circumstances.

**M. J. C.**